

SENATE BILL 3576  
By Person, Curtis

AN ACT to amend Tennessee Code Annotated,  
Title 29, Chapter 34, to enact the "Silica  
Compensation Fairness Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, Chapter 34, is amended by adding Sections 2 through 12 of this act as a new part.

SECTION 2. This part shall be known and may be cited as, the "Silica Compensation Fairness Act".

SECTION 3.

(a) Silica is a naturally occurring mineral and is the second most common constituent of the earth's crust. Crystalline silica is present in sand, quartz, and granite.

(b) Silica-related illness, including silicosis, can occur when silica is inhaled. To be inhaled, silica particles must be sufficiently small to be respirable. These tiny particles are created when sand is pulverized in the sandblasting process and may be found in the fine silica flour used in various foundry processes.

(c) Silicosis was recognized as an occupational disease many years ago. The American Foundry Society has distributed literature to its members warning of the dangers of silica exposure for more than seventy (70) years. By the 1930s, the federal government had launched a silica awareness campaign which led to greater protection for workers exposed to silica dust.

(d) Silica disease cases have been declining for two (2) decades. The number of new lawsuits alleging silica-related disease has, however, risen precipitously in recent years. One of America's largest suppliers of industrial sand had more than fifteen thousand (15,000) new

claims filed in the first six (6) months of 2003, which is three (3) times the number of claims it had in all of 2002 and more than ten (10) times the number of claims it had in all of 2001. A growing consensus of judicial opinions and studies confirms that a small group of lawyers working nationwide has filed thousands of silica lawsuits on behalf of individuals who do not have silica-related disease, in an effort to force mass settlements benefiting almost exclusively the lawyers who file the cases. This threatens a litigation crisis in Tennessee similar to the asbestos litigation crisis, costing Tennesseans jobs and economic growth, while depriving persons with actual claims the ability to obtain compensation for their injuries.

(e) The legislature finds that compensation for persons with silica-related disease must take priority over the interests of lawyers filing meritless lawsuits. The public interest requires giving priority to the claims of exposed individuals who are sick in order to help preserve, now and for the future, compensation for people who develop silica related injuries and to safeguard the jobs, benefits, and savings of workers in Tennessee.

SECTION 3. It is the purpose of this part to:

- (1) Give priority to silica claimants who can demonstrate actual physical impairment caused by exposure to silica;
- (2) Fully preserve the rights of claimants who were exposed to silica to pursue compensation should they become impaired in the future as a result of such exposure;
- (3) Enhance the ability of the judicial systems to supervise and control silica litigation; and
- (4) Conserve economic resources to allow compensation of those who are physically impaired by exposure to silica while securing the right to similar compensation for those who may suffer physical impairment in the future.

SECTION 4. As used in this part, unless the context otherwise requires:

(1) "AMA guides to the evaluation of permanent impairment" means the American Medical Association's guides to the evaluation of permanent impairment;

(2) "Board-certified oncologist" means a medical doctor who is certified by the American Board of Internal Medicine in the subspecialty of medical oncology;

(3) "Board-certified pathologist" means a medical doctor who is certified by the American Board of Pathology;

(4) "Board-certified pulmonary specialist" means a medical doctor who is certified by the American Board of Internal Medicine in the subspecialty of pulmonary medicine;

(5) "Certified B-reader" means an individual qualified as a "final" or "B-reader," as defined in 42 C.F.R. § 37.51(b), as amended;

(6) "Civil action" means all suits or claims of a civil nature in a Tennessee state court of record, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(A) A civil action relating to any claim for workers compensation under title 50;

(B) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. § 524(g); or

(C) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under the United States Bankruptcy Code;

(7) "Competent medical authority" means a medical doctor who meets the following requirements:

(A) The medical doctor is a board-certified pulmonary specialist, oncologist or pathologist;

(B) The medical doctor is actually treating, or has treated, a claimant under this part, and has or had a doctor-patient relationship with the claimant;

(C) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(i) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(ii) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition outside the context of an existing doctor-patient relationship; or

(iii) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of a law firm or lawyer sponsoring the examination, test, or screening;

(D) The medical doctor spends not more than ten percent (10%) of such doctor's annual practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent (20%) of its revenues from providing such services;

(8) "Exposed person" means a person whose exposure to silica or mixed dust is the basis for a silicosis claim or mixed dust disease claim under the part;

(9) “ILO scale” means the system for the classification of chest x-rays set forth in the International Labour Office’s guidelines for the use of ILO International Classification of Radiographs of Pneumoconioses (2000), as amended;

(10) “Lung cancer” means a malignant tumor in which the primary site of origin of the cancer is inside the lungs;

(11) “Mixed dust” means a mixture of dusts composed of silica and one (1) or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity;

(12) “Mixed dust disease claim” means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust. “Mixed dust disease claim” includes a claim made by or on behalf of any person who has been exposed to mixed dust, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to the person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person’s health that are caused by the person’s exposure to mixed dust;

(13) “Mixed dust pneumoconiosis” means the interstitial lung disease caused by the pulmonary response to inhaled mixed dusts;

(14) “Nonmalignant condition” means a condition, other than a diagnosed cancer, that is caused or may be caused by either silica or mixed dust, whichever is applicable;

(15) “Pathological evidence of mixed dust pneumoconiosis” means a statement by a board-certified pathologist that more than one (1) representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar and parenchymal stellate (star-shaped) nodular scarring and that there is no other more likely explanation for the presence of the fibrosis;

(16) “Pathological evidence of silicosis” means a statement by a board-certified pathologist that more than one (1) representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of round silica nodules and birefringent crystals or other demonstration of crystal structures consistent with silica (well-organized concentric whorls of collagen surrounded by inflammatory cells) in the lung parenchyma and that there is no other more likely explanation for the presence of the fibrosis;

(17) “Physical impairment” means a nonmalignant condition or lung cancer of an exposed person who is a smoker, whichever is applicable;

(18) “Premises owner” means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters;

(19) “Radiological evidence of mixed dust pneumoconiosis” means a chest x-ray showing bilateral rounded or irregular opacities in the upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale;

(20) “Radiological evidence of silicosis” means a chest x-ray showing bilateral small rounded opacities (p, q, or r) in the upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale;

(21) “Silica” means a respirable crystalline form of silicon dioxide, including, but not limited to, alpha quartz, cristobalite, and tridymite;

(22) “Silicosis claim” means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with silica. “Silicosis claim” includes a claim made by or on

behalf of any person who has been exposed to silica, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to the person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to silica;

(23) "Silicosis" means an interstitial lung disease caused by the pulmonary response to inhaled silica;

(24) "Smoker" means a person who, during the last fifteen (15) years, has smoked the equivalent of one (1) pack per year, as specified in the written report of a competent medical authority;

(25) "Substantial contributing factor" means both of the following:

(A) Exposure to silica or mixed dust is the predominate cause of the physical impairment alleged in the silicosis claim or mixed dust disease claim, whichever is applicable; and

(B) A competent medical authority has determined with a reasonable degree of medical certainty that without the silica or mixed dust exposures the physical impairment of the exposed person would not have occurred;

(26) "Substantial occupational exposure to silica" means employment for a cumulative period of at least five (5) years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(A) Handled silica;

(B) Fabricated silica-containing products so that the person was exposed to silica in the fabrication process;

(C) Altered, repaired, or otherwise worked with a silica-containing product in a manner that exposed the person on a regular basis to silica; or

(D) Worked in close proximity to workers who experienced substantial occupational exposure to mixed dust in a manner that exposed the person on a regular basis to silica;

(27) “Substantial occupational exposure to mixed dust” means employment for a cumulative period of at least five (5) years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(A) Handled mixed dust;

(B) Fabricated mixed dust-containing products so that the person was exposed to mixed dust in the fabrication process;

(C) Altered, repaired, or otherwise worked with a mixed dust-containing product in a manner that exposed the person on a regular basis to mixed dust; or

(D) Worked in close proximity to other workers who experienced substantial occupational exposure to silica in a manner that exposed the person on a regular basis to mixed dust;

(28) “Tort action” means a civil action for damages for personal injury or wrongful death under the common or statutory laws of Tennessee. “Tort action” does not include a civil action for damages for a breach of contract or another agreement between persons, or a civil action for damage to property;

(29) “Veterans’ benefit program” means any program for benefits in connection with military service under Title 38 of the United States Code; and

(30) “Workers’ compensation law” means title 50, chapter 6, and judicial decisions decided thereunder.

## SECTION 5.

(a) No person shall bring or maintain a tort action alleging a silicosis claim based on a nonmalignant condition in the absence of a prima facie showing that, in the opinion of a competent medical authority, the exposed person has a physical impairment, and that the person's exposure to silica is a substantial contributing factor to the physical impairment. Evidence the competent medical authority must consider in order to reach such an opinion shall include:

(1) A detailed occupational and exposure history, including a medical and smoking history, of the exposed person taken by the competent medical authority from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the silicosis claim for a nonmalignant condition; and

(2) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing, that both of the following apply to the exposed person:

(A) The exposed person has a permanent respiratory impairment rating of at least class 2, as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment; and

(B) The exposed person has silicosis based at a minimum on radiological or pathological evidence of silicosis.

(b) No person shall bring or maintain a tort action alleging that silica caused that person to contract lung cancer if the exposed person is or was also a smoker, in the absence of a prima facie showing that, in the opinion of a competent medical authority, the person has lung cancer, and the person's exposure to silica is a substantial contributing factor to the lung cancer.

Evidence the competent medical authority must consider in order to reach such an opinion shall include:

(1) Evidence of the time elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer;

(2) Radiological or pathological evidence of silicosis; and

(3) Evidence of the exposed person's substantial occupational exposure to silica.

(c) No person shall bring or maintain a tort action alleging a silicosis claim based for the wrongful death of an exposed person, in the absence of a prima facie showing, that, in the opinion of a competent medical authority, the death of the exposed person was the result of a physical impairment, and that the person's exposure to silica was a substantial contributing factor to the physical impairment causing the person's death. Evidence the competent medical authority must consider in order to reach such an opinion shall include:

(1) Evidence of the time elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer;

(2) Radiological or pathological evidence of silicosis; and

(3) Evidence of the exposed person's substantial occupational exposure to silica.

(d) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American Thoracic Society, as published in the American Review of Respiratory Disease, 1991:144:1202-1218.

## SECTION 6.

(a) No person shall bring or maintain a tort action alleging a mixed dust disease claim based on a nonmalignant condition in the absence of a prima facie showing that, in the opinion of a competent medical authority, the exposed person has a physical impairment, and that the person's exposure to mixed dust is a substantial contributing factor to the physical impairment. Evidence the competent medical authority must consider in order to reach such an opinion shall include:

(1) A detailed occupational and exposure history, including a medical and smoking history, of the exposed person taken by the competent medical authority from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the mixed dust disease claim for a nonmalignant condition; and

(2) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing, that both of the following apply to the exposed person:

(A) The exposed person has a permanent respiratory impairment rating of at least class 2, as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment; and

(B) The exposed person has mixed dust disease based at a minimum on radiological or pathological evidence of mixed dust disease.

(b) No person shall bring or maintain a tort action alleging that mixed dust caused that person to contract lung cancer if the exposed person is or was also a smoker, in the absence of a prima facie showing that, in the opinion of a competent medical authority, the person has lung cancer, and the person's exposure to mixed dust is a substantial contributing factor to the lung

cancer. Evidence the competent medical authority must consider in order to reach such an opinion shall include:

- (1) Evidence of the time elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis of the exposed person's primary lung cancer;

- (2) Radiological or pathological evidence of mixed dust disease; and

- (3) Evidence of the exposed person's substantial occupational exposure to mixed dust.

(c) No person shall bring or maintain a tort action alleging a mixed dust disease claim based for the wrongful death of an exposed person, in the absence of a prima facie showing, that, in the opinion of a competent medical authority, the death of the exposed person was the result of a physical impairment, and that the person's exposure to mixed dust was a substantial contributing factor to the physical impairment causing the person's death. Evidence the competent medical authority must consider in order to reach such an opinion shall include:

- (1) Evidence of the time elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis of the exposed person's primary lung cancer;

- (2) Radiological or pathological evidence of mixed dust disease; and

- (3) Evidence of the exposed person's substantial occupational exposure to mixed dust.

(d) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive

standards set forth in the official statement of the American Thoracic Society, as published in the American Review of Respiratory Disease, 1991:144:1202-1218.

#### SECTION 7.

(a) The plaintiff in any tort action who alleges a silicosis claim or a mixed dust disease claim shall file, within thirty (30) days after filing the complaint or the effective date of this act, whichever is later, a written report by a competent medical authority, and any supporting evidence, making out the prima facie case described in Section 5 or 6, as applicable. Upon a motion for summary judgment filed pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, within one hundred twenty (120) days of the filing of the plaintiff's proffered prima facie case, the defendant in the tort action may challenge the adequacy of the proffered prima facie evidence for failure to comply with the minimum requirements specified in Section 5 or 6 as applicable

(b) If the court finds that no genuine issue of material fact exists with respect to plaintiff's failure to make out a prima facie case as described in Section 5 or 6, the court shall dismiss the plaintiff's claim as a matter of law. The court shall maintain its jurisdiction over any case that is so dismissed without prejudice. Any plaintiff whose case has been so dismissed without prejudice may move at any time to reinstate the plaintiff's case, upon a renewed prima facie showing that meets the minimum requirements specified in Section 5 or 6, as applicable.

(c) This section applies only to tort actions that allege a silicosis claim or a mixed dust disease claim and that have been filed and are pending on or after the effective date of this part.

#### SECTION 8.

(a) Notwithstanding any other provision of law, with respect to any silicosis claim or mixed dust disease claim based upon a nonmalignant condition that is not barred as of the effective date of this part, the period of limitations shall not begin to run until the exposed person

discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment due to a nonmalignant condition.

(b) No damages shall be awarded for fear or risk of cancer in any tort action asserting a silicosis claim or a mixed dust disease claim for a nonmalignant condition.

SECTION 9. The following shall apply to all tort actions for silicosis or mixed dust disease claims brought against a premises owner to recover damages or other relief for exposure to silica or mixed dust on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure unless that individual's alleged exposure occurred while the individual was on the premises owner's property;

(2) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, it is presumed that a premises owner knew that Tennessee had adopted safe levels of exposure for silica or mixed dust and that products containing silica or mixed dust were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of silica or mixed dust in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist; and

(3)

(A) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove products containing silica or mixed dust on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must demonstrate by a preponderance of the evidence that the premises

owner had actual knowledge of the potential dangers of the products containing silica or mixed dust at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(B) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform shall not be liable for any injury to any individual resulting from silica or mixed dust exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(C) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard in effect at the time of the exposure, and that the alleged violation was in the plaintiff's immediate breathing zone and was the proximate cause of the plaintiff's injury.

#### SECTION 10.

(a) Nothing in this part is intended, and nothing in any of those sections shall be interpreted, to affect the rights of any party in bankruptcy proceedings under Title 11 of the United States Code.

(b) This part shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(c) Nothing in this part shall be interpreted as authorizing the exhumation of bodies.

#### SECTION 11.

(a) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to silica or mixed dust has the burden of proving at trial that the plaintiff was exposed to silica or mixed dust that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's silica or mixed dust was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's silica or mixed dust was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(1) The manner in which the plaintiff was exposed to the defendant's silica or mixed dust;

(2) The proximity of the defendant's silica or mixed dust to the plaintiff when the exposure to the defendant's silica or mixed dust occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's silica or mixed dust; and

(4) Any factors that mitigated or enhanced the plaintiff's exposure to silica or mixed dust.

(b) This section applies only to tort actions that allege any injury or loss to a person resulting from exposure to silica or mixed dust and that are or have been filed and are pending on or after the effective date of this part.

#### SECTION 12.

(a) No tort action alleging a personal injury or wrongful death as a result of silica or mixed dust exposure may be filed in the courts of Tennessee after the effective date of this part unless the plaintiff was a resident of Tennessee at the time the claim arose or the plaintiff's claim arose in Tennessee. For purposes of this part, a claim arises in Tennessee if the plaintiff

was located in Tennessee at the time the claimant alleges to have been exposed to silica or mixed dust.

(b) To comply with this section in relation to an action that involves both claims that arose in this state and claims that arose outside this state, a court shall consider each claim individually and shall sever from the action the claims that are subject to this part.

(c) A tort action under this part may only be filed in the venue where the plaintiff resides, or was exposed to silica, mixed dust, or both, that was a substantial contributing factor to the physical impairment on which plaintiff's claim is based. If a plaintiff alleges that the plaintiff was exposed to silica, mixed dust, or both, in more than one (1) venue, the court shall determine, upon motion of any defendant found outside the venue in which the tort action is pending, which venue is the most appropriate forum for the claim, considering the relative amounts and lengths of the plaintiff's exposure to silica dust in each venue.

SECTION 13. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 14. This act shall take effect July 1, 2006, the public welfare requiring it.